



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 628 OF 2014

JAMES MAOGA OSIEMO

CLAIMANT

v

LAMINATE TUBE INDUSTRIES LIMITED RESPONDENT

JUDGMENT

1. For determination is the question whether the termination of the employment of James Maoga Osiemo (Claimant) through a letter dated 6 January 2014 by Laminate Tube Industries Ltd (Respondent) was unfair and if so appropriate remedies (Claimant identified 4 issues but in reality there are only 2 issues).
2. The Cause was heard on 13 October 2016 when both the Claimant and the Respondent's Human Resources & Administration Manager testified.
3. The Claimant filed his submissions on 14 October 2016, while the Respondent filed its submissions on 25 October 2016.
4. The Court has considered the pleadings, evidence and submissions.

Whether termination of employment was unfair

Procedural fairness

5. In his testimony, the Claimant stated that he was dismissed on 31 December 2013 and the reason he was given was *reduced business* and that he was paid 1 month pay in lieu of notice.
6. The Respondent's Human Resources Manager in her testimony confirmed that the reason for the termination was because the Respondent had decided to downsize.
7. As to why the Claimant was selected for termination on account of downsizing, the witness testified that the Claimant had a bad disciplinary history.
8. However, in the letter of termination of employment, the Respondent asserted a contractual provision to terminate on notice without cause and did not give any other reason.
9. From the narration given by both the Claimant and the Respondent's witness, the instant case is one of redundancy and therefore the conditions set out in section 40 of the Employment Act, 2007 are implicated.
10. The Respondent did not show that it complied with all the conditions set out in statute particularly that

the local labour officer was informed in writing and in advance.

11. On that single ground, the Court finds that the termination of the Claimant's employment was procedurally unfair.

Substantive fairness

12. Although it is not necessary for the Court to make inquiries as to the substantive fairness of the termination of the Claimant's employment in light of the finding on procedural fairness, the Court wishes to make a few observations.

13. One, termination of employment on account of redundancy should be based on operational requirements and not *misconduct* as appears to have been the case here.

14. Two, it is doubtful whether an employer can validly and fairly rely on a *termination without cause clause* in a contract under the current statutory framework governing termination of employment and more so in light of section 43 of the Employment Act, 2007 which oblige an employer to prove the reasons for termination of employment, and section 45 of the same Act which require an employer to prove the reasons as valid and fair.

15. The authority of *Joseph Ndambuki & 4 Ors v Delmonte (K) Limited* (2012) eKLR cited by the Respondent to urge that *termination at will by an employer* is still sound law addressed a dismissal in 2005, well before the statutory intervention made by the Employment Act, 2007 in the employment relationship.

Appropriate remedies Wages for January 2014

16. The Claimant sought Kshs 2,115/90 on account of wages for January 2014 but in testimony he testified that he was sent away on 31 December 2013.

17. He cannot get the same and further the final dues schedule show he was paid Kshs 425/- as wages for January 2014.

1 month pay in lieu of notice

18. The Claimant was paid Kshs 9,200/- on account of pay in lieu of notice and he cannot get the same.

Gratuity

19. Gratuity is either contractual or statutory. The Claimant did not lay any contractual or statutory basis for gratuity, but the evidence in Court indicate he was paid Kshs 11,500/- as gratuity.

Compensation

20. The Court has reached a conclusion that the termination of the Claimant's employment on account of redundancy was procedurally unfair.

21. The Claimant served the Respondent for about 6 years and considering the length of service, the Court is of the view that the equivalent of 7 months gross wages would be fair and appropriate.

22. Although the Claimant did not lead any direct evidence on his remuneration (filed pay slips were not produced), he pleaded his gross monthly wage was Kshs 10,580/-).

Conclusion and Orders

23. The Court finds and holds that the termination of the Claimant's employment was on account of

